TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

No. [redacted]

MARGARET W. PEARSON AND J. R. PEARSON, HER HUSBAND, APPELLANTS,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JANUARY 28, 1904

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SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 26, 1924

[fol. 1] **IN THE COURT OF CLAIMS**

No. C-738

MARGARET W. PEARSON and J. R. PEARSON, Her Husband, Petitioners,

vs.

THE UNITED STATES

Removal of Improvements Contrary to Provisions of Lease

I. PETITION—Filed June 12, 1923

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioners, Margaret W. Pearson and J. R. Pearson, her husband, respectfully represent:

1

That petitioner, Margaret W. Pearson, is and at all times hereinafter stated was the wife of petitioner J. R. Pearson; that petitioner Margaret W. Pearson at all times hereinafter stated did own a cer- [fol. 2] tain tract of land, situate, lying and being in Duval County, State of Florida, and more particularly described as follows:

"A. E. Ferguson Grant, being Section Forty-three (43), in Township Three (3), Range Twenty-six (26) East, containing five hundred and thirty-five (535) acres, more or less."

2

That under date of September 11, A. D., 1917, petitioners did execute a lease of the afore-described land unto Jacksonville Chamber of Commerce, a corporation having its principal office in the City of Jacksonville, Duval County, Florida, "for and during the continuance of the war now in progress between the United States of America and the German Empire, provided, however, that this lease shall terminate and expire three years from the date hereof, it being the intent and purpose to create a lease to run for a period not longer than three years which period is to expire upon the termination of said war should said war be terminated within three years from the date hereof," which said lease contained certain terms, conditions and provisions as will more fully appear in and by copy of said lease hereto attached as Exhibit "A," reference to which said Exhibit "A" is hereby made and which said Exhibit "A" is hereby made a part hereof; that among said terms, conditions and provisions it was expressly covenanted and agreed:

"And the lessors, for themselves, their heirs, legal representatives and assigns, covenant and agree with the lessee, its successors and assigns, that all buildings, fixtures and/or other improvements placed in or upon said land during said term by the lessee, its suc-[fol. 3] cessors or assigns, shall remain the exclusive property of the lessee, its successors or assigns, and at all times during the peri-d of three months next after the expiration of said term said lessee, its successors or assigns, may enter upon said land for the purpose of removing and may remove said buildings, fixtures and/or other improvements."

3

That shortly after the execution of the aforesaid lease by petitioners the said Jacksonville Chamber of Commerce did verbally agree with the War Department of the Government of the United States, the exact date and terms of said verbal agreement being unto your petitioners unknown, but which date was within a few weeks after the date of said lease, that the afore-described land might be used by the said War Department as a portion of the land upon which to lay out and construct a training camp for troops of the United States Army, said land being thereafter included in and forming a part of Camp Joseph E. Johnston; that the only right or interest of said Jacksonville Chamber of Commerce at any time was that derived through and under the lease from petitioners aforesaid; that the United States became privy in estate and by contract with your petitioners upon entering into the verbal agreement aforesaid for the use of said land; that the United States could and did derive no greater or further right or interest through said agreement with said Jacksonville Chamber of Commerce in or to said land or appurtenances than such as were held by said Jacksonville Chamber of Commerce through and under said lease as aforesaid; and the United States were bound and obligated not to exceed or violate the terms, [fol. 4] conditions and provisions of said lease, copy of which is hereto attached as Exhibit "A"; that said Jacksonville Chamber of Commerce did consent and agree that said land might be occupied by the United States as aforesaid and petitioners did acquiesce and consent to the use and occupancy of said land by the United States under and subject to the terms, conditions and provisions of said lease.

4

That during the rightful use and occupancy by the United States under the aforesaid agreement and lease, the War Department erected extensive buildings upon said lands and placed extensive improvements thereon, laid pipes and conduits in said land for water mains and other purposes; that what was known as the "base hospital" of Camp Joseph E. Johnston was erected upon the said land as aforesaid, as were also homes for nurses and other buildings and structures; that said buildings were completed and fully equipped with all necessary appliances, facilities, plumbing and electric wiring, which appliances, facilities, plumbing and equipment, because of the use to which said buildings were put, were more extensive and

numerous than in other types of buildings, and were of a higher quality.

5

That by Act of Congress of March 3, 1919 (40 Stat. 1302), said hospital together with its equipment, including sites and leases, was transferred to the Treasury Department for the use of the Public [fol. 5] Health Service; that said lease from petitioners unto said Jacksonville Chamber of Commerce expired not later than, to-wit, three (3) years from its date, September 11, 1917, said expiration date being midnight of September 10, 1920, and the three (3) months' period within which buildings, fixtures and/or other improvements properly removable from said land could rightfully be removed, expired at midnight of, to-wit, December 10, 1920; that on December 9, 1920, letter was written by J. L. Doggett as attorney for petitioners and delivered to Commanding Officer, Camp Johnston, Jacksonville, Florida, which letter stated:

"I beg to advise that the lease, wherein the property known as the hospital grounds of Camp Johnson were leased to the City of Jacksonville and under the terms of which lease the Government of the United States occupied the grounds and directed the buildings on the hospital site, expired September 11, 1912, and by the terms of this lease three months was given after the expiration thereof within which any building might be removed, but that at the end of this period all further rights of entry and occupation by the lessee should cease. Therefore, December 11 is the date this property should be finally surrendered to the lessors without further removal or molestation of any of the property remaining thereon.

"I do not know what the plans of the War Department are in regards to the hospital property. I am taking this opportunity of notifying you in due time in order that should you have instructions to the contrary after December 11, that you might communicate the contents of this notification to the proper officials. I shall be more than glad at any time to confer with you concerning this matter and should you desire to see the original lease it is on file in the office of the City Commission of the City of Jacksonville.

"I am acting in this matter as attorney for J. R. Pearson and wife [fol. 6] of Knoxville, Tenn., who are the owners of this property."

That reply to said last mentioned letter was duly received, said reply being as follows:

"War Department
Headquarters, Camp Joseph E. Johnston
Jacksonville, Fla.

Dec. 10, 1920.

From: Commanding Officer, Camp Jos. E. Johnston, Fla.
To: Mr. John L. Doggett, Atty., 119-24 Heard Bldg., Jacksonville, Fla.
Subject: Leased Land—Base Hospital.

1. Reference your letter Dec. 9th, that portion of Camp Joseph E. Johnston known as "Base Hospital" was transferred from the War Department to the United States Public Health Service, a Bureau of the Treasury Department, effective about May 1st, 1919. All control by the War Department over this property and leases pertaining thereto, passed to the United States Public Health Service about that date. Matters referred to in your letter should be taken up with that Bureau of the Government.

2. Your letter has been transmitted to the Superintendent of Construction, U. S. Public Health Service Hospital No. 33 at this Camp.

(Signed) P. M. Stevens, P. M. Stevens, Maj. 61st Inf., Commanding." PMS—MS.

That under date of January 10, 1921, petitioners' said attorney, J. L. Doggett, wrote to Major Goodwin, Commanding Officer Base Hospital, Camp Johnston, Jacksonville, Florida, as follows:

[fol. 7] "I have not heard from you further concerning the conference held in my office not very long ago, concerning the disposition of the property now on the hospital grounds, and I, therefore, assume that our agreement stands the same as when we last considered this matter.

"If there has been any new developments I shall be glad to hear from you."

That subsequently petitioners' said attorney, J. L. Doggett, received the following letter:

"Treasury Department

United States Public Health Service Hospital No. 33

Office of Medical Officer in Charge

Jacksonville, Florida,
(Camp Johnston), January 15th, 1921.

Mr. John L. Doggett, 1119 Heard Building, Jacksonville, Fla.

SIR: I have just received a letter from Washington, stating that the matter of sending a representative of the Public Health Service to confer with you is now under consideration.

Further information will be furnished you immediately this office receives same.

Respectfully, (Signed) P. F. Goodwin, Superintendent of Construction."

That on March 3, 1921, said J. L. Doggett, attorney for petitioners, sent letter to Major Goodwin at Camp Johnston, Jacksonville, Florida, which stated:

"Some time ago I received a letter from you to the effect that the Public Health Department in Washington would send a representa-
[fol. 8] tive here to confer with me concerning the disposition of the matter we discussed in my office. At our last conference it was agreed that you would take no steps whatsoever in removing any materials from the buildings on this hospital property. I have been informed, however, that this agreement has not been complied with. I am loath to believe that such is the case, and of course I have taken no action whatsoever on account of our agreement.

However, in order to avoid any more unnecessary delay in this matter I suggest to you the propriety of urging immediate action of some character on the part of the Public Health Service."

Receipt of letter last afore-mentioned was acknowledged as follows:

"Treasury Department

United States Public Health Service Hospital No. 33 (Closed)

Office of Medical Officer in Charge

Camp Johnston,
Jacksonville, Florida, March 5th, 1921.

Mr. J. L. Doggett, 1119 Graham Building, Jacksonville, Florida.

SIR: Receipt of your letter of the 3rd inst. is herewith acknowledged, and same is being forwarded to the Surgeon General, Washington, D. C., for his attention.

Respectfully, (Signed) P. F. Goodwin, Superintendent of Construction." L.H.S.

That under date of January 10, 1921, said J. L. Doggett, attorney for petitioners, sent a letter to the Quartermaster General of the Army, Real Estate Department, Washington, D. C., as follows:

[fol. 9]

"Jan. 10, 1921.

From: John L. Doggett, Attorney at Law, as Agent for J. R. Pearson and wife, Margaret Pearson.

To: The Quartermaster General of the Army, Real Estate Department, Washington, D. C.

Subject: Land occupied by the United States Government at Camp Johnston, Jacksonville, Florida.

1. I am informed by the Commanding Officer at Camp Johnston that in order to obtain a formal surrender of the use and occupation of certain lands now occupied by the Government of the United States at Camp Johnston, and owned by J. R. Pearson and wife, Margaret Pearson, whom I represent as attorney and agent, that it is proper for a request to be directed to the above department. The land to which I refer is legally described as follows:

That parcel of land known as the A. E. Ferguson grant, being Section 43, in Township 3, Range 26, containing 535 acres more or less, Duval County, State of Florida.

This parcel of land includes the hospital grounds at Camp Johnston as well as a small part of the land within Camp Johnston itself. I have been informed that the hospital grounds proper are now under the United States Public Health Service, and all control by the War Department over this part of the property has ceased. Major P. M. Stevens, 61st Infantry commanding Camp Johnston, however, has informed me that there is a small part of this land occupied by the Government within the bounds of Camp Johnston proper, and that in order to obtain a secession of occupation of this small parcel by the War Department, that I could obtain the same by addressing this communication to the Real Estate Department. There are no buildings on this land, and it was simply idle land lying between Camp Johnston proper and the hospital grounds, and as the owners have been very desirous of regaining possession of this particular [fol. 10] tract, I will thank you if you will please give this matter as early attention as is practical and convenient, and inform me in the premises.

2. The owners of this property are making no claim whatsoever for loss of property or use or occupation of this land by the Government.

J. L. Doggett."

That subsequently petitioners' said attorney received letter from the Surgeon General in words and figures following:

"Treasury Department

Bureau of the Public Health Service

Washington

Office of the Surgeon General

In reply please refer to HD-21.
CHS: ARW: GFB.

March 28, 1921.

Pearson Tract, Jacksonville, Fla.

Judge John L. Doggett, Attorney at Law, Heard Building, Jacksonville, Florida.

SIR: Your letter of January 10, 1921, addressed to the Quartermaster General of the Army, Washington, D. C., in relation to the relinquishment of the Pearson Tract of land occupied by the United States in connection with Camp Joseph E. Johnston, Jacksonville, Florida, has been referred to this Bureau for reply.

Owning to the necessity of salvaging certain materials placed upon the property by the Government and now needed elsewhere

for hospital purposes, the use of the premises will be required until about May 1, 1921.

Respectfully, (Signed) H. S. Cumming, Surgeon General"

[fol. 11] That said J. L. Doggett, as attorney for petitioners, under date of April 6, 1921, did reply to the letter of March 28th, 1921, from the Surgeon General, stating:

"I am in receipt of your letter of March 28 in reply to my letter of January 10, in which I requested relinquishment of the Pearson tract of land occupied by the United States in connection with Camp Joseph E. Johnston.

In your letter you state that owing to the necessity of salvaging certain material placed on the property by the Government and now needed elsewhere for hospital purposes, the use of the premises will be required until about May 1, 1921.

In this connection I desire to call your attention to the fact that this property was leased from Mr. Pearson by the Chamber of Commerce of the City of Jacksonville, which organization assigned the lease to the City Commission of the City of Jacksonville, which in turn assigned it to the Government. The lease expired in September, 1920. Its terms provided that after the expiration of the lease, three months would be allowed for the removal of any buildings which had been placed on the property. At the expiration of this three months period, to-wit: in December, 1920, I had a conference with Major Goodwin who is in charge of the hospital property at Camp Johnston, and whom I understand represents the Public Health Service. At this meeting, I stated to Major Goodwin that while Mr. Pearson did not desire to embarrass the plans of the Government, yet under the terms of the lease all the buildings, etc., on the land were now a part of the property itself, and legally were no longer subject to removal. It was agreed that Major Goodwin should obtain authority from your office, or have some representative from your office communicate with me in order that a definite arrangement might be made with the Department of Public Health as to future procedure.

[fol. 12] This was done with the full understanding that there would be no further destruction of any buildings now standing or removal of any property which had not already been salvaged, to which Major Goodwin agreed, and this was confirmed by subsequent conferences.

I find now that the Department of Public Health has proceeded to continue its work of salvaging and tearing down buildings on this property without having giving me any further notice, contrary to the agreement between Major Goodwin and myself, as set forth above. I feel certain that this is no fault of Major Goodwin, as I assume that he is acting under orders from your Department, and in reply to a recent letter of mine he stated that he had referred the whole matter to your office.

I have refrained from taking any Court action whatsoever to enjoin the work of salvaging on this property, as I have felt sure that

a proper adjustment could be made of this matter, and I suggest to you the propriety of a prompt consideration of this matter.

Should you desire to clothe Major Goodwin with authority to deal with me for the disposition of the case, I should be glad to proceed with him upon a proper presentation of his credentials from your Department, or if you desire to treat directly with me, I will thank you to please advise me in the premises.

A prompt reply will be appreciated."

6

That, nevertheless, after all times had past and all periods elapsed within which such buldings, structures and improvements could have been rightfully removed, and in violation of the terms and provisions of said lease and of the rights of petitioners, jointly and severally, the Public Health Service of the Government of the United States did tear down, dig up and remove or cause to be torn [fol. 13] down, dug up and removed, all buildings, structures and improvements placed as aforesaid upon said land; that the exact date or dates of such removal is unto petitioners unknown, but petitioners are informed and believe and therefore aver that such removal was done as aforesaid in the early months of the year 1921, to-wit, the months of March, April, May, and June of said year.

7

That petitioners are unable to specify with particularity the description, value or quantity of materials, supplies, lumber, equipment, appliances, facilities, plumbing, wiring, piping and conduits, removed from said land when said Public Health Service demolished said buildings, structures and improvements in violation of the terms, conditions and provisions of said lease and which buildings, structures and improvements under the terms, conditions and provisions of said lease had become a part of the land itself and the title to which had passed to and vested in the owner of the reversion at the expiration of the three (3) months' period expressly specified and designated as the period and limitation for removel of such buildings, structures and improvements; that the records of the Government of the United States contain complete data showing the description and quantity of such materials, supplies, lumber, appliances, facilities, equipment, plumbing, wiring, piping and conduits, which went into said building, structures and improvements and which were removed from said land as aforesaid; that the records of the Government pertaining to said hospital are now in the United States Veterans' Bureau; that subsequent to the removal by the Public Health Service [fol. 14] as aforesaid of said buildings, structures and improvements, the President of the United States by Executive Order dated April 29, 1922, transferred said hospital, then and therein designated as "No. 33 Jacksonville, Florida," from the United States Public Health Service to the United States Veterans' Bureau and directed that "all records, files, documents, correspondence and other papers relating to the service rendered by the United States Public Health

Service in the operation of the hospitals and purveying depots hereby transferred * * * are hereby transferred to the United States Veterans' Bureau as of the effective date of this Order;" that application to examine said files and records in the United States Veterans' Bureau pertaining to said hospital was made by petitioners through their undersigned attorneys prior to the institution of this suit for the purpose of ascertaining the description and quantity of the materials, supplies, equipment, appliances, facilities, plumbing, wiring and piping so removed as aforesaid from said land; but that said undersigned attorneys were not permitted to secure such information from said files and records; that petitioners are informed and believe and therefore aver that the value of said buildings, appliances, structures, improvements, equipment, materials and supplies so removed as aforesaid are of a very large amount, to-wit, in excess of One Hundred Thousand Dollars ($100,000); that the value of said buildings, structures and improvements so removed by the United States as aforesaid from the lands of petitioner, Margaret W. Pearson, is justly due and owing to said petitioner by the United States and said petitioner is justly entitled to the value thereof from the United States and that there exists in favor of the United States no debt, claim or [fol. 15] set-off by which the said amount herein prayed for may or should be reduced; that your petitioners have made no assignment or transfer of said claim or any part thereof or interest therein; that petitioners have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government, and petitioners believe the facts as stated in this petition to be true.

Wherefore, your petitioners pray: That this Honorable Court will render a judgment in favor of petitioners against the United States for the full value of all buildings, structures and improvements removed as aforesaid from said lands in violation of the rights of petitioners.

Margaret W. Pearson, J. R. Pearson, Petitioners and Claimants.

Jurat showing the foregoing was duly sworn to by Norman B. Morrell, omitted in printing.

[fol. 16] EXHIBIT "A" TO PETITION

This lease, Made this 11th day of September, A. D., 1917, by and between J. R. Pearson and Margaret W. Pearson, his wife, of Knox County, Tennessee, herein called the lessors, and Jacksonville Chamber of Commerce, a corporation having its principal office in the City of Jacksonville, Duval County, Florida, herein called the lessee, Witnesseth:

That in consideration of the covenants contained herein on the part of the said lessee to be kept and performed, the said lessors do hereby lease to the said lessee the following property:

A. E. Ferguson Grant, being Section Forty-three (43), in Township Three (3), Range Twenty-six (26) East, containing five hundred and thirty-five (535) acres, more or less, Duval County, State of Florida.

And the said lessors do hereby grant, sell, transfer and deliver unto said lessee all timber upon said aforedescribed property, save and excepting oak trees growing within a distance of three hundred yards from the river front;

To have and to hold, The same for and during the continuance of the war now in progress between the United States of America and the German Empire, provided, however, that this lease shall termi- [fol. 17] nate and expire three years *form* the date hereof, it being the intent and purpose to create a lease to run for a period not longer than three years, which period is to expire upon the termination of said war should said war be terminated within three years *form* the date hereof, the said lessee covenanting and agreeing to save the said lessors harmless *form* any and all taxes or assessments against said property or any ortion of the same during the term of this lease.

And said lessee does further covenant and agree to pay to said J. R. Pearson, as damages to and for the full right, title and interest in and to all timber upon said afore-described property save and excepting oak trees growing within a distance of three hundred (300) yards from the river-front, the sum of Fifteen Hundred ($1500.00) Dollars, as evidenced by 90 day note for said amount this day delivered by said lessee to said J. R. Pearson, the receipt of which note is hereby acknowledged, it being expressly understood and agreed that said lessee is not to remove or damage any of the oak trees growing upon said property within a distance of three hundred (300) yards from the river-front.

It is further covenanted and agreed by the lessee herein, and its successors and assigns, that said property will be used solely for Federal Camp purposes, except as to said timber herein-above granted, bargained and sold to said lessee.

And the lessors, for themselves, their heirs, legal representatives and assigns, covenant and agree with the lessee, its successors and assigns, that all buildings, fixtures and/or other improvements placed in or upon said land during said term by the lessee, its successors or assigns, shall remain the exclusive property of the lessee, its successors or assigns, and at all times during the period of three months [fol. 18] next after the expiration of said term said lessee, its successors or assigns, may enter upon said land for the purpose of removing and may remove said buildings, fixtures and/or other improvements and the timber hereinabove and hereby granted, bargained and sold to the lessee.

And the lessee, for itself, its successors and assigns, hereby covenants and agrees with the lesors, their heirs, legal representatives and assigns, that upon the expiration of said term, or of the said period of three months thereafter, it or they will pay to the lessors, their heirs, legal representatives or assigns, all damages accruing to the lessors, their heirs, legal representatives or assigns, by virtue of injury done to said land, exclusive of timber, by the lessee, its

successors or assigns, during said term or within said period of three months thereafter.

In witness whereof, the said parties have caused these presents to be duly executed the day and year first above written.

J. R. Pearson. (Seal.) Margaret W. Pearson. (Seal.) Jacksonville Chamber of Commerce, by —— —— Its President.

Witnesses: Henry C. Clark, E. P. Owen, Jr., as to J. R. Pearson; Norman B. Morrell, Lucille E. Young, as to Margaret W. Pearson.

Attest: ——, Secretary.

STATE OF FLORIDA,
COUNTY OF DUVAL, *ss:*

I hereby certify that on this day personally appeared before me, [fol. 19] an officer duly authorized to administer oaths and take acknowledgments, J. R. Pearson, to me well known as the person described in and who executed the foregoing lease, and he acknowledged before me that he executed the same freely and voluntarily, and for the purposes therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal at Jacksonville, in said County and State, this the 10th day of September, A. D. 1917.

E. P. Owen, Jr., Notary Public in and for the State of Florida at Large. My commission expires 24th day of February, A. D. 1921. (Notarial Seal.)

STATE OF TENNESSEE,
COUNTY OF KNOX, *ss:*

I hereby certify, that on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgments, Margaret W. Pearson, to me well known and known to me to be the person described in and who executed the foregoing lease, and she acknowledged before me that she executed the same for the purposes therein expressed; and the said Margaret W. Pearson, known to me to be the wife of the said J. R. Pearson, on a separate and private examination taken and made by and before me, separately and apart from her said husband, did acknowledge that she made herself a party to said lease for the purpose of renouncing, relinquishing and conveying all her right, title and interest, whether of dower, homestead or separate property, statutory or equitable, in and to the lands described therein, for the purpose of said lease, and that she executed the said lease freely and voluntarily and without any com- [fol. 20] pulsion, constraint, apprehension or fear of or from her said husband.

Witness my hand and official seal at Knoxville, County of Knox, and State of Tennessee, this the 17 day of September, A. D. 1917.

Norman B. Morrell, Notary Public. (My Commission expires April, 1918.) (Notarial Seal.)

[fol. 21] II. Defendant's Demurrer.—Filed Sept. 14, 1923

Defendant demurs to the petition in the above-entitled case for the reason that it does not set forth a cause of action against the United States within the jurisdiction of this Court.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Special Assistant to the Attorney General.

III. Argument and Submission of Demurrer

On October 9, 1923, the demurrer in this case was argued and submitted by Mr. William F. Norris, for defendant, and by Mr. Henry C. Clark, for the plaintiff.

[fol. 22] IV. Opinion of the Court by Hay, J.—Entered October 15, 1923

Hay, Judge, delivered the opinion of the court:

In this case the United States has filed a demurrer to the petition of the plaintiffs.

The petition alleges the following facts:

On September 11, 1917, the plaintiffs leased to the Chamber of Commerce of Jacksonville, Florida, a tract of land "for and during the continuance of the war now in progress between the United States of America and the German Empire, provided, however, that this lease shall terminate and expire three years from the date hereof, it being the intent and purpose to create a lease to run for a period not longer than three years, which period is to expire upon the termination of said war should said war be terminated within three years from the date hereof."

The Jacksonville Chamber of Commerce verbally agreed with the War Department of the United States that the land leased by it from the plaintiffs might be used by the United States as a part of the land upon which the United States might construct a training camp for troops of the Army, the said land being thereafter included in and forming a part of Camp Joseph E. Johnston. While the United States was in possession of the land of the plaintiffs under the lease the War Department erected buildings and placed improvements on the aforesaid tract of land and erected the base hospital of Camp Joseph E. Johnston and houses for nurses on said land.

Among other provisions the lease provided as follows:

"And the lessors, for themselves, their heirs, legal representatives and assigns, covenant and agree with the lessee, its successors and assigns, that all buildings, fixtures and/or other improvements placed in and upon said land during said term by the lessee, its successors

or assigns, shall remain the exclusive property of the lessee, its successors or assigns, and at all times during the period of three months next after the expiration of said term said lessee, its successors or assigns, may enter upon said land for the purpose of removing and may remove said buildings, fixtures and/or other improvements."

On December 9, 1920, the plaintiffs through their attorney advised the officer in charge of Camp Jospeh E. Johnston that the three years specified in the lease would expire on December 11, 1920, and that the property should be on that date surrendered to the lessors, "without further removal or molestation of any of the property remaining thereon."

[fol. 23] After some correspondence between the attorney of the plaintiffs and the officers of the United States the plaintiffs were advised on March 28, 1921, as follows by the Surgeon General of the Public Health Service:

"Owing to the necessity of salvaging certain materials placed upon the property by the Government, and now needed elsewhere for hospital purposes, the use of the premises will be required until about May 1, 1921."

The United States after March 28, 1921, proceeded to remove, and did remove, all buildings, structures, and improvements placed by the Government on the land of the plaintiffs. The plaintiffs allege that the property so removed by the United States under the terms of the lease belonged to the plaintiffs and was of the value of $100,000, and they have brought this suit in this court to recover the value of the property so removed.

The plaintiffs seem to rely in the first place upon the terms of the lease, and claim that after the expiration of the three years' period the houses and improvements placed on their property by the Government became theirs. But the lease expressly provides that "all buildings, fixtures, and/or other improvements placed in and upon said land during said terms by the lessee, its successors, or assigns, shall remain the exclusive property of the lessee, its successors or assigns," and while the lease further provides for a period of three months after the expiration of the lease during which period the lessee may enter upon the land for the purpose of removing the buildings, fixtures, and improvements placed thereon, yet there is nothing in this provision which defeats that provision of the lease which provides that the buildings, fixtures, and improvements placed upon the land during the term of the lease shall be the exclusive property of the lessee, its successors or assigns. If this interpretation of the meaning of the lease is correct—and we think it is—then the plaintiffs have no title to the property the value of which they are seeking to recover, and the demurrer of the defendant must be sustained.

The Government, however, as appears from the allegations of the petition, never admitted that the property removed from the land of the plaintiffs was the plaintiffs'. On the contrary, the Government

asserted title to the property and removed the property from the land, claiming that it owned it, and had use for it elsewhere. This fact that the Government claimed title in the property and denies title in the plaintiffs prevents this court from assuming jurisdiction of the controversy. The plaintiffs could only recover under an implied promise. The law will not imply a promise by the Government to pay for an interest or right in land which right or interest the Government claimed, and claims it possessed before it utilized the same. Temple v. The United States, 248 U. S. 121, 130.

The facts alleged in the petition do not show an implied promise to pay; they preclude implying such promises. See also Hill v. United States, 149 U. S. 593, 598, 599.

The demurrer should be sustained and the petition dismissed. And it is so ordered.

Graham, Judge; Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 24] V. Judgment of the Court

At a Court of Claims held in the City of Washington on the Fifteenth day of October, A. D., 1923, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiff's petition, on consideration whereof the court is of opinion that the demurrer is well taken. It is therefore adjudged and ordered that the defendant's said demurrer be sustained, and that the petition be and the same is hereby dismissed.

By the Court.

VI. Plaintiffs' Application for Appeal—Filed December 17, 1923

From the judgment rendered in the above-entitled case on the 15th day of October, nineteen hundred and twenty-three, the petitioners by their attorney on the 17th day of December, nineteen hundred and twenty-three, make application for and give notice of an appeal to the Supreme Court of the United States.

Henry C. Clark, Attorney for Petitioners. Williams & Clark, of Counsel.

VII. Order of Court Allowing Appeal—Filed January 7, 1924.

It is ordered by the court that the plaintiffs' application for appeal be and the same is allowed.

By the Court.

[fol. 25] IN COURT OF CLAIMS

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case on demurrer; of the opinion of the Court by Hay, J., of the judgment of the court; of the plaintiffs' application for appeal and of the order of the court allowing said appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Fourteenth day of January A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 30,075. Court of Claims. Term No. 264. Margaret W. Pearson and J. R. Pearson, her husband, appellants, vs. The United States. Filed January 24th, 1924. File No. 30,075.

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IN THE

Supreme Court of the United States

MARGARET W. PEARSON, *and* J. R. PEARSON, *her husband*, *Appellants.* *vs.* THE UNITED STATES.	October Term, 1924 No. 264

BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT OPPOSING MOTION TO DISMISS OR AFFIRM

Appellants' rights spring from the relationship of landlord and tenant, and are contractual. The lease executed by appellants under which the United States secured possession of appellants ' land provided a specific time for the removal of buildings placed upon the land. Failure to comply with this contractual provision, removal of the buildings long after the agreed time limit and a violation by the tenant of the rights of the landlord, *and over appellants' protest*, constitute the basis for this action.

Furthermore, the taking of appellants' property, contrary to the terms of the lease contract, brings the case within the prohibition of the Fifth Amendment to the Constitution of the United States: "Nor shall private property be taken for public use without just compensation."

The rights of all parties to this suit are measured by the contractual status of landlord and tenant The chief function of a decision herein will be to define what these contractual rights are. Appellants have sustained damage by a "confiscatory breach of contract."

The instant case presents far more contractual elements than many cases which this Court has held to come within the jurdiction of the Court of Claims. This case is essentially a contract case. It is also a case arising under the Constitution of the United States.

Appellants object to any disposition of this case on a motion to dismiss or affirm, and submit that the merits of the case are of such importance as to require consideration after submission upon oral argument in regular course.

STATEMENT OF THE CASE

Under date of September 11, 1917, appellants executed a lease to certain of their real estate. This lease ran to Jacksonville Chamber of Commerce. Among its provisions were the following:

> "In consideration of the covenants contained herein on the part of the said lessee to be kept and performed, the said lessors do hereby lease to the said lessee the following property."

> "To have and to hold, The same for and during the continuance of the war now in progress between the United States of America and the German Empire, provided, however, that this lease shall terminate and expire three years from the date hereof, it being the intent and purpose to create a lease to run for a period not longer than three years, which period is to expire upon the termination of said war should said war be terminated within three years from the date hereof."

"And the lessors, for themselves, their heirs, legal representatives and assignes, covenant and agree with the lessee, its successors and assigns, that all buildings, fixtures and / or other improvements placed in or upon said land during said term by the lessee, its successors or assigns, shall remain the exclusive property of the lessee, its successor or assigns, and at all times during the period of three months next after the expiration of said term said lessee, its successors, or assigns, may enter upon said land for the purpose of removing and may remove said buildings, fixtures and / or other improvements and the timber hereinabove and hereby granted, bargained and sold to the lessee."

In addition to leasing the land, this instrument also sold certain standing timber to the lessee, the removal of which was covered by the last provision above.

Shortly after the execution of this lease, the Jacksonville Chamber of Commerce verbally agreed with the War Department that it might use this land as a part of Camp Johnston, which was done and extensive hospital buildings were erected by the War Department upon appellants' land. (R. 2).

By Act of Congress of March 3, 1919, (40 *Stat.* 1302), this hospital was transferred to the Treasury Department for the use of the Public Health Service. (R. 3).

The three years' duration of the lease expired September 10, 1920, and the three months' period for removing the buildings expired on midnight of December 10, 1920. On December 9, 1920, appellants' attorney delivered a letter to the commanding officer at Camp Johnston, pointing out therein that the period for removal of the buildings ceased on December 11, 1920, and that after that date *there should be no "removal or molestation" of the improvements.* (R. 3).

Under date of March 28, 1921, the Surgeon General

addressed a letter to appellants' attorney, in which it was stated:

> "Owing to the necessity of salvaging certain materials placed upon the property by the Government and now needed elsewhere for hospital purposes, the use of the premises will be required until about May 1, 1921." (R. 6-7).

Promptly upon receipt of this letter, appellant's attorney replied with *a vigorous protest against the removal of the buildings* contrary to the terms of the lease. (R. 7-8).

Nevertheless, the United States removed the buildings. This suit is brought to recover the value of all buildings and improvements removed in violation of the contract. (R. 8).

The United States demurred to the petition, upon the sole ground that "it does not set forth a cause of action against the United States within the jurisdiction of this Court." (R. 12).

The Court of Claims sustained this demurrer and dismissed the petition, upon the ground that there had been no breach of contract, and that the United States took property to which it asserted title "before it utilized the same." (R. 12-14).

Specification of Errors

1. The error of the lower Court in holding that there had been no breach of the contractual obligation between landlord and tenant.

2. The error if the lower Court in holding that appellants were not entitled to compensation for private property taken for public use.

3. The error of the lower Court in holding that it was without jurisdiction in this case.

4. The error of the lower Court in dismissing the petition herein.

ARGUMENT

I

Appellants Entitled to Recover for Breach of Contractual Obligation Between Landlord and Tenant

Camp Johnston was constructed by the Secretary of War under authority of the Act of July 2, 1917. (40 Stat. 241). This Act of Congress authorized the Secretary of War to contract for the use of land for camp sites. The authority to contract includes authority to agree upon terms.

The action of the Secretary of War in contracting for the use of appellant's land and in erecting the hospital thereon, was necessarily ratified and approved by Congress when it directed that this hospital be transferred to the Treasury Department for the use of the Public Health Service (40 Stat. 1302). Further ratification and approval of the acts of government officials with respect to this hospital may be found in the Act of Congress authorizing the President to transfer to the United States Veterans Bureau the "operation, management and control of specifically designated hospitals now under the jurisdiction of the Public Health Service," (42 Stat. 150). Under authority of this latter statute the President, by an executive order, transferred the hospital in question to the Veterans Bureau.

There can be no question of unauthorized use of the lands by the erection of the hospital. There can be no question whose lands were occupied. There can be no question of consent of the owners to the occupation by the United States. The Government can have no greater rights than those granted by the lease to the Jacksonville Chamber of Commerce. If the Government should not come within the terms of this lease, then the result announced in *United States v. Pacific R. R. Co.*, 120 U. S. 227, 239, 30 L. Ed. 634, 638, occurs:

> "Private parties cannot be charged for works constructed on their lands by the Government to further the operations of its armies. Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the Government, or to pay for such works when erected by the Government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the Government.
>
> "It is true that in some instances the work thus constructed may afterwards be used by the owner; a house built for a barrack, or for the storage of supplies or for a temporary fortification, might be converted to some purposes afterwards by the owner of the land, but that circumstance would impose no liability upon him. Whenever a structure is permanently affixed to real property, belonging to an individual, without his consent or request, he cannot be held responsible because of the subsequent use. *It becomes his by being annexed to the soil* (italics ours); and he is not obliged to remove it to escape liability."

Railroad bridges are no more essential to an army than are training camps.

In *Van Ness v. Pacard*, 2 Pet. 137, 143, 7 L. Ed. 374, 377, the law is thus announced:

> "The general rule of the common law certainly is, that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed except by him who is entitled to the inheritance."

But the Government recognized itself at all times as a tenant. Consequently, it cannot deny its landlord's title. *Willison v. Watkins*, 3 Pet. 43, 47, 7 L. Ed. 596, 598; *35 C. J. 1224*. That there may be an implied contract of tenancy on the part of the United States is established in *Carpenter v. United States*, 17 Wall. 489, 21 L. Ed. 680.

The privity between a landlord and tenant is accurately described in *Rector vs. Gibbon*, 111 U. S. 276, 284, 28 L. Ed. 427, 430, where it is shown that the possession of the tenant is in law the possession of the landlord, that the tenant is under duty to surrender his possession upon the termination of the lease and is estopped to deny the landlord's rights. It is further stated that these obligations extend 'to every person who enters under lessees with knowledge of the terms of the lease, whether by operation of law, or by purchase and assignment."

Since the United States claims under the lease to the Jacksonville Chamber of Commerce, its rights to the improvements must be tested by that instrument. As stated in *Allen v. Gates*, 73 Vt. 222, 50 A. 1092, 1093:

> "When the parties to a lease make specific provisions therein relating to the tenant's erecting buildings or other structures on the property leased, and the time of removing the same or of otherwise disposing of them, such provisions are of binding force between the parties, and are controlling."

Similarly in *Vanhoozer v. Gattis*, 139 Ark. 390, 395, it is said:

> "Tenants must remove buildings placed by them upon leased premises within the time specified in their leases, else they immediately become a part of the real estate to which attached."

In *Hughes v. Kershow*, 42 Col. 210, 93 Pac. 1116, 15 L. R. A. N. S. 723, 725, it is said:

> "In the lease it was expressly stipulated that all improvements erected upon the property by the lessee should belong to him, and that he might remove the same during the sixty days last preceding the expiration of the lease, provided he had paid all rents, taxes, and assessments agreed to be discharged by him. Thus by express contract, the building mentioned became personal property during the life of the lease. This provision was for the benefit of the lessee; but, to avail himself of such benefit, it was incumbent upon him to remove the building before expiration of the contract. If he failed to do so in accordance with the terms specified, then upon expiration of the contract, by operation of law, the building ceased to be personalty. Its character as a fixture attached, and it at once became a part of the real estate."

In *Uffman v. Meyle*, 181 App. Div. 944, 168 N. Y. S. 483, it is declared:

> "Plaintiff was bound by the lease, which he had executed and retained. When he received from the defendant the written notice to terminate the tenancy, but nevertheless allowed the six months to run out without removing the buildings, plaintiff elected to abandon them to the lessor."

An important case is that of *Texas and N. O. R. Co. v. Clevinger*, (Tex. Civ. App.) 223, S. W. 1036, 1038, from which we quote the following:

> "By the terms of the contract, plaintiff had a reasonable time, after notice of the termination of his lease, in which to remove the house. Had he failed to comply with this request within a reasonable time, he would have forfeited his right to remove the house from the right of way. 'In the absence of a special stipulation to the contrary, fixtures placed upon the demised premises by the tenant are personal property, subject, however, to become parts of the realty, if not removed by him during the time allowed him by law for their removal.' *Wright v. McDonnell*, 88 Tex. 140, 30 S. W. 907. On the facts of this record, it became a pertinent inquiry as to whether the plaintiff had been allowed a reasonable time in which to remove his house from the leased premises, when the servants of the Director General of Railroads entered thereon and tore it down. If a reasonable time had elapsed, then this defendant was in no way liable to plaintiff, because the house would become a part of the realty."

The stipulation for a definite time in which a tenant may remove improvements is meaningless, if it be held that the tenant may remove the improvements after the expiration of the stipulated time. *Expressio unius est exclusio alterius.*

It is expressly stipulated in the lease under consideration that:

> "In consideration of the covenants contained herein on the part of the said lessee to be kept and performed, the said lessors do hereby lease to the said lessee the following property." (R. 9).

The principles here applicable have probably been considered most extensively in cases having to do with sales of standing timber, where a limited time for removal is stipulated. The holding of this class of cases is summarized in 17 *R. C. L.* 1085-6 (published in 1917), as follows:

> "The weight of authority is apparently to the effect that while a contract for the sale of standing timber passes title to the timber, such title is subject to defeasance as to the timber not removed within the time limited, whether the limitation be the implied one of a reasonable time, in which event some courts have based their decision upon the theory of abandonment, or whether the limitation be expressly fixed in the instrument itself, and the timber remaining standing at the end of the limtied period is the property of the vendor."

Subsequently in a note published in 1921 and found in 15 *A. L. R.* 70, it is said:

> "When the contract specifies a time for the removal of timber, *the great majority* (italics ours) of courts hold that the rights of the purchaser terminate upon his failure to remove within the time stated, and reinvest in the owner of the land."

The accuracy of this quotation is conclusively established by exhaustive references to decisions.

That "the great majority of courts" so hold is again shown in a very recent note, published in 1924, and found in 31 *A. L. R.* 948.

In a single sentence taken from *Williams vs. McCarty*, 82 W. Va. 158, 95 S. E. 638, 100, S. E. 565, 15 A. L. R. 9, 16, the common sense of the matter is thus expressed:

> "If he would get the advantage of his purchase he must remove the timber within the time specified in the contract."

The lease under consideration also embodies a sale of standing timber with a stipulated time for removal (R. 9, 10). This suit does not involve this timber, except as an aid to interpretation of the lease. *It would be a strange construction to say that the identical clause*

prescribing the time for removal meant one thing with reference to removal of timber but meant something entirely different when applied to removal of buildings.

The Texas case of *Reader v. Christian* (Tex. Civ. App.) 234, S. W. 155, relied upon by appellee, (Page 7 of Motion to dismiss or Affirm), is poorly reasoned and wholly out of line with legal principles and authorities upon the point to which it is cited. This was demonstrated by one of the members of the Court who dissented from this portion of the decision, and who showed that the holding in this respect was contrary to the settled law of Texas as evidenced by *Texas and N. O. R. Co. v. Clevenger,* which case is quoted from at page 8 of our brief. Furthermore, in *the Reader case,* it was clearly made to appear that the owner of the reversion by his conduct and representations had estopped himself from insisting upon a removal of the improvement within the stipulated time. *In the instant case, not only is there no such estoppel, but on the contrary, we find that appellants protested again and again against the removal.* (R. 3 to 8).

The rule in Texas as applied to the removal of timber is contrary to that stated in *the Reader case* with respect to buildings. In *Conn v. Houston Oil Company,* Tex. Civ. App. , 218 S. W. 137, the Texas rule for timber contracts is thus stated:

> "Timber deeds and contracts, containing time limits for the removal of timber, pass no title whatever, save to so much of the timber as the vendee may remove within the time limited."

See also *Broocks v. Moss,* Tex. , 212 S. W. 153.

Florida also follows the majority rule in the construction of timber contracts: *Livingston v. Drew Lumber Co.,* 82 Fla. 508, 90 So. 466.

Appellee's argument confuses an unequivocal trespass, or an act which is exclusively a tort, with an act which is a breach of a contractual obligation. For instance, the case of *Langford v. United States*, 101 U. S. 341, relied upon by appellee, is distinguished in the subsequent case of *Dooley v. United States*, 182 U. S. 222, 226, 45 L. Ed. 1074, 1079, as follows:

> "It was held that the act of the United States in taking and holding possession, was an *unequivocal tort*, and a distinction was drawn between such a case and one where the Government takes for public use lands to which it asserts no claim of title, but admits the ownership to be private or individual, in which case there arises implied obligation to pay the owner its just value." (Italics ours).

In other words the ground work of the instant case is not tortious, but based upon a relationship of landlord and tenant. A tort is sometimes defined as a civil wrong independent of contract. See *Pollock* on *Torts*, Chapter I. See also the interesting discussion of what acts do and do not constitute torts in *Alexander v. United States*, 39 Ct. Cl. 383.

We find in international law certain cases which are classified as "Confiscatory Breaches of Contract," in which the breach of contract also amounts to a tort and a confiscation of property. See *Moore's International Law Digest*, Sec. 997. This term is appropriately applicable to the present state of facts.

Appellants did not elect to treat appellee as a trespasser after the expiration of the period stated in the lease to the Jacksonville Chamber of Commerce. The holding over created a tenancy at sufferance. The holding over was under the original entry.

This situation is specifically covered by statue in Flor-

ida. Section 3570, *Revised General Statutes of Florida*, provides:

> "That when any tenancy shall have been created by an instrument of writing and the term of which such tenancy is (as) limited therein shall have expired and the tenant shall hold over in the possession of said premises without renewing the said lease by some further instrument of writing then such holding over shall be construed to be a tenancy at sufferance, and the mere payment or acceptance of rent shall not be construed to be a renewal of the said term, but if such holding over be continued with the consent of the lessor then such tenancy shall become a tenancy at will under the provisions of this Act."

Section 3567, *Id.*, provides:

> "That any lease of lands and tenements, or either, hereafter made, shall be deemed and held to be a tenancy at will unless the same shall be in writing signed by the lessor."

By these statutes any claim that appellee was a trespasser and wrongfully entered upon the land is dissipated.

Such holding over relates only to the extension of the occupancy of the land. It did not renew the former lease, particularly where the holding over was by a sub-tenant who was no party to the formal written lease, and which sub-tenant held by mere verbal agreement.

A case in point is *United States v. Bostwick*. 94 U. S. 53, 24 L. Ed. 65, in which the court declared:

> "The United States when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them. No lease in form was ever executed in this case;

but the contract, followed by the delivery of possession and occupation under it, is equivalent for the purposes of this action to a lease duly executed, containing all the stipulations agree upon."

"It appears in the finding that, during the occupancy under the lease, ornamental trees were destroyed, fences and walks torn down, and the materials used for sidewalks and the erection ot other buildings, or carried away; and that stone was quarried and gravel dug from a stone-quarry and gravel-pit on the premises, and taken away. *This was voluntary waste*, and within the prohibition of the implied agreement in the lease. For this the Court of Claims can award compensation in this action." (Italics ours).

In the case of *Tempel v. United States*, 248 U. S. 121, 130, 63 L. Ed. 162, 165, the court indicates its approval of the earlier case of *United States v. Lynah*, by quoting therefrom, among other things, as follows:

"Whenever in the exercise of its governmental rights, it (the United States) takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor."

We need not go nearly so far in this case as the court went in *United States v. State National Bank of Boston*, 96 U. S. 30, 36, 24 L. Ed. 647, 648, where it said:

"In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract by which they might well become bound in virtue of their corporate character. There sovereignty is in nowise involved."

"Surely it ought to require neither argument nor authority to support the proposition, that, where the

> money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party."

In *Lyons v. United States*, 30 Ct. Cl. 352, 360, the long recognized rule pertaining to Government contracts is thus announced:

> "The law, as we understand it, was stated by Hamilton in these words: 'When a Government enters into a contract with an individual it deposes, as to the matter of contract, its constitutional authority, and exchanges the character of a legislater for that of a moral agent with the same rights and obligations as an individual.' (3 Hamilton's Works, page 518)."

The United States demands strict performance of its contracts by the other party thereto. For instance, Attorney General Black in an opinion to the Secretary of War upon an application for relief by a contractor, remarked (9 *Op. At. Gen.* 81):

> "He now says he is doing the work at a loss, and asks you, in a memorial, either to give him a larger compensation than he bargained for or else to release him from the contract. You have no authority to do either of these things. You can not absolve him from his obligation to do the work; and, if he does it, you can not authorize him to be paid for it at higher price than the contract stipulates for. * * * In short, you have no power to relieve him from the hardship he complains of, either by giving him damages, by releasing him from the present contract, or by making a new one. * * * If the contractor quits the work or otherwise violates the covenants he has made with the Government, he must do so at his own peril and that of his sureties."

Many other statements of the strictness with which the United States requires fulfillment of contracts, are set forth in *Dig. Op. J. A. G.*, 1912, page 325, Note 2.

Will the Government demand complete performance from the other party, and in the same breath contend that it can disregard its obligation with impunity?

That the United States must live up to its contracts, even though by oversight of some officer, it thereby sustains a loss, is declared in *Cooke v. United States*, 91 U. S. 389, 398, 23 L. Ed. 237, 243, as follows:

> *"A government may suffer loss through the negligence of its officers. If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.* Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and if it fails in this, its claim upon the parties is lost. *U. S. v. Barker*, 12 Wheat. 559. *Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect.* But this cannot happen until the officer specially charged with the duty, if there be one, has acted, or ought to have acted. As the government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative authorized to act in all the emergencies of its commercial transactions. If it fail in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world." (Italics ours).

In appellee's brief, reliance is placed upon an alleged claim of title by the United States to the improvements at the time of their removal. There are two answers to this.

In the first place, no claim of title by the United States to these improvements was made at the time of the removal. The letter of the Surgeon General dated March 28, 1921, (R.6), does not claim title in the United States to these improvements. The language of this letter: "Owing to the necessity of salvaging *certain materials placed upon the property* by the Government and now needed elsewhere for hospital purposes, the use of the premises will be required until May 1, 1921," is too vague and indefinite to stand as a claim of title to *the permanent structures erected upon appellant's land.*

In the second place, the supposed claim of title asserted in appellee's brief, arises out of the very contract which is the subject matter of the suit, and is merely the equivalent of a denial of liability. Appelle cannot divorce the wrong to appellants from the contractual relationship. In all contested cases before the Court of Claims, the United States asserts that the right or title involved is not with plaintiff, but is with the Government. This constitutes the issue the Court is called upon to adjudicate.

It is submitted that appellee as tenant violated the rights of appellants as landlords, and that this gave rise to a contractual liability within the jurisdiction of the Court of Claims.

II

Appellants Entitled to Compensation for Private Property Taken for Public Use

Appellee's demurrer admits that appellants' property was taken by the United States and that this was taken for the purpose stated by the Surgeon General,— to build

hospitals (R. 6). This is a taking of private property for a public use. The Surgeon General had been put in charge of the hospital at Camp Joseph E. Johnston by direct Act of Congress (40 Stat. 1302). The Act of Congress, however, did not and could not enlarge the right or title of the United States to the ground upon which the hospital stood, or alter the limitations coupled therewith.

This hospital having been thus placed by Congress in the charge of the Surgeon General, he proceeded to exercise his authority. Congress placed no time limit on this authority. The authority carried with it all the means and power which by implication necessarily accompany authority conferred on an executive officer. It continued until the order of the President transferred this hospital (although by that time demolished) to the United States Veterans Bureau (R. 8). The Surgeon General determined that certain buildings should be transferred to another hospital. This he had authority to do. See 32 *Op. At. Gen.* 411. While proceeding with this authority the Surgeon General went too far, or delayed too long, with the result that appellants' property was appropriated to the use of the Government.

Unless appellants obtain the relief sought, their property will have been taken from them for the use of the Government or public, and the burden would fall entirely upon appellants and not upon the public generally. In such case payment must be made to prevent inequality.

> *Michigan Cent. Ry. Co. vs. Slack*, 17 Fed. Cas. No. 9,527a, affirmed 100 U. S. 595, 25 L. Ed. 647.
>
> 11 *Fed. Stat. Ann.* 2nd Ed. 452.

The following quotation from *United States vs. Pacific*

R. R. Company, 120 U. S. 227, 239, 30 L. Ed. 634, 638, shows (a) that appellants' property was taken for a public use, (b) that appellants' are entitled to compensation:

> "In what we have said as to the exemption of Government from liability for private property injured or destroyed during the war, by the operations of armies in the field, or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies such as vessels, steamboats, and the like, for the transport of troops and munitions of war, or buildings to be used as storehouses and places of deposit of war material, *or to house soldiers or take care of the sick*, or claims for supplies seized and appropriated. In such cases, it has been the practice of the Government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell V. Harmony*, 54 U. S. 13 How. 134 (14:83); *U. S. v. Russell*, 80 U. S. 13 Wall. 623 (20:474)." (Italics ours).

In *Shoemaker v. United States*, 147 U. S. 282, 297, 37 L. Ed. 170, 184, the Court said, respecting what constitutes a public use:

> "Land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health, or business, is taken for a public use."

If use for parks constitutes a public use, certainly providing Government hospitals for disabled soldiers, sailors and marines *a fortiori* constitutes a public use.

In *United States v. Russell*, 13 Wall. 623, 627, 20 L. Ed. 474, it is declared:—

> "Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent. 2 Kent. Com., 11th ed. 339; 2 Story, Const., 3d ed. 596."

In *Filbin Corporation v. United States*, 266 Fed. 911, the District Court of the United States for the Eastern District of South Carolina, announced the following principles:—

> "The language of the Fifth Amendment to the Constitution of the United States is:
>
> > 'Nor shall private property be taken for public use without just compensation.'
>
> "Nothing is said about 'requisition' or 'condemnation;' the word used is 'taken.' The result of either condemnation or requisition is *a taking*, and therefore, in the opinion of the court, this amendment applies to the taking of private property, whether it be by requisition or by condemnation, and both requisition and condemnation being exercised by virtue of the same provision of constitutional law, commonly called 'eminent domain,' which allows the interest of the individual to be subordinated to that of that of the public, and private property to be taken compulsorily for public use, in the opinion of the court, under the Constitution of the United States, there is no difference between a 'requisition' and a 'condemnation,' so far as the obligation of the United States is concerned, to award to the owner just compensation."

Appellants did not suffer mere consequential injury. Their property was taken from them. The following from *United States v. Lynah*, 188 U. S. 445, 471, 47 L. Ed. 539, 549, applies:

> "If any one proposition can be considered as settled by the decisions of this Court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the 5th Amendment of paying just compensation."

Alexander v. United States, 39 Ct. Cl. 383, is a case in which claimant's farm in Pennsylvania was taken by authority of the Secretary of War for a military camp during the Spanish-American War. When the troops left, the land was in bad condition; fences had been destroyed, and other damage done. The case is particularly interesting and applicable. Among other things, the court said:

> "The decedent in this proceeding had the fee-simple title — the highest estate which can be held in land, but subservient to the paramount right of the Government to take it for public use, upon the condition that compensation be made to him for its use, or its value."

> "The value of that estate was taken to the extent that the extraordinary use by the defendants impaired its value, and from which the defendants derived a substantial benefit in the use and occupation of the land for military purposes."

> "The court will take judicial notice of the condition of the Government during the existence of the Spanish war; that it was in no embarrassed condition in the resources of supplies to occasion the exercise of the powers of war, such as surrounded it during the Civil War. The law was not silent in the

> State or Pennsylvania, so as to deprive the citizen from all the safeguards of the Constitution in the protection of his rights of property and the lawful means of redress."

The quotation *supra* from *United States v. Pacific Railroad Company,* announced the principles by which our Government adjusted claims arising prior to and during the Civil War. *Alexander v. United States,* presents the rule which was applied to claims resulting from the Spanish-American War.

We find these principles applied by the Judge Advocate General of the Army to similar claims arising during the recent World War. In 2 *Op. J. A. G.* (1918) page 961, it is said:

> "In regard to those claims where there exists no lease between the claimants and the United States on the buildings, etc., which were taken, used, or destroyed with the consent of the owner, expressed or tacit, then there arises an implied promise on the part of the United States to pay just compensation and, therefore, in the opinion of this office such claims having been properly determined by the board, and acquiesced in by the owners, may be paid."

Until we are prepared to repeal the 5th Amendment to the United States Constitution, it is submitted that appellants are entitled to recover for their property taken by the United States for a public use, and the Court of Claims has jurisdiction of the matters presented by the petition.

III

Jurisdiction of the Court of Claims Embraces Four Classes of Cases

The Court of Claims has jurisdiction over four classes of cases, namely:—

> "(1) Those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an executive department; (3) cases of contract, express or implied, with the Government; (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. The words 'not sounding in tort' are in terms referable only to the fourth class of cases."
>
> *Dooley vs. United States*, 182 U. S. 222, 224, 45 L. Ed. 1074, 1078.
>
> *Alexander vs. United States*, 39 Ct. Cl, 383, 392.

A claim against the Government for salvage, is an illustration of the fourth class. *The United States vs. Cornell Steamboat Company*, 202 U. S. 184, 50 L. Ed. 987.

The rights of appellants which appellee violated fall within two of these four classes. Defendant's acts constitute (a) a taking of private property for public use, (b) a violation of the contractual relation of landlord and tenant, coming respectively within the Ist and 3rd classes of cases just enumerated over which the Court of Claims has jurisdiction.

CONCLUSION

The petition shows no unlawful entry. It shows a holding over after a rightful entry. Appellee did not surrender possession until after it had committed the waste or completed the taking which constitutes the foundation of this action. This holding over was by statute in Florida, neither a wrongful entry nor a trespass. Appellee was at all times in possession under appellants, holding in subordination to their title.

There are situations in which the United States cannot claim title and proceed to appropriate property without liability. No more evident case of this sort could be found than one in which the United States secures possession of land as tenant and while in such possession repudiates the title of the landlord. That is this case, under the government's contention.

The cases relied upon by appellee in which it was held there was no right of action against the United States were cases of unequivocal torts, (See page 12 of this brief.) The instant case meets the jurisdictional requirement announced in *Schillinger v. United States*, 155 U. S. 162, 167, 39 L. Ed. 108, 110: "Some element of contractual liability must lie at the foundation of every action."

It is submitted that this case is founded (1st) upon contract, and (2nd) upon the Constitution of the United States. Over such a case the Court of Claims has jurisdiction, and its judgment dismissing the petition should be reversed.

Respectfully submitted,

GEORGE FRANCIS WILLIAMS,
HENRY C. CLARK,
Attorneys and Counsel for Appellants.

In the Supreme Court of the United States

OCTOBER TERM, 1924

MARGARET W. PEARSON AND J. R. PEARSON her husband, appellants
v.
THE UNITED STATES
No. 264

APPEAL FROM THE COURT OF CLAIMS

MOTION BY APPELLEE TO DISMISS OR AFFIRM

Now comes the Solicitor General of the United States and moves the court to dismiss the appeal or affirm the judgment in this case.

STATEMENT

This is an appeal by Margaret W. Pearson and J. R. Pearson, her husband, from a judgment of the Court of Claims sustaining a demurrer to their petition which questioned the sufficiency of the facts averred therein to constitute a cause of action against the United States within the jurisdiction of that court.

The action was instituted to recover $100,000 damages for the removal of buildings, fixtures, etc., by the United States under claim of title from

property leased from claimants through the Chamber of Commerce of Jacksonville, Florida.

THE FACTS

Substantially the following are the material facts alleged in the petition:

Claimants, being owners of a tract of land containing about 535 acres described in the petition, leased the same on September 11, 1917, to the Chamber of Commerce of Jacksonville, Florida, " for and during the continuance of the war now in progress between the United States of America and the German Empire, provided, however, that this lease shall terminate and expire three years from the date hereof, it being the intent and purpose to create a lease to run for a period not longer than three years, which period is to expire on the termination of said war should said war be terminated within three years from the date hereof." (Rec. 1.) The lease contained a covenant that all buildings, fixtures and/or other improvements placed in or upon the land during the term by the lessee, its successors or assigns, shall remain the exclusive property of the lessee, its successors or assigns, who may at any time during the term of the lease and within three months thereafter enter and remove the same. (Rec. 2.) The lease is set forth in the record at pages 9, 10, 11.

Within a short time after September 11, 1917, the Chamber of Commerce of Jacksonville verbally agreed with the War Department that the land

covered by the lease under consideration might be used as a portion of the lands upon which to lay out and construct a training camp for troops of the United States Army. The land thereafter became a part of Camp Joseph E. Johnston. The Chamber of Commerce consented and agreed with the United States that the demised premises might be occupied by the latter for the purposes outlined herein, and the claimants acquiesced and consented to such use and occupancy by the Government under and subject to the terms, conditions and provisions of the lease. (Rec. 2.)

The War Department erected extensive buildings upon the premises and placed extensive improvements thereon, laid pipes and conduits for water mains and other purposes; erected what was known as " base hospital " of Camp Joseph E. Johnston upon the land, including homes for nurses and such other buildings and structures as a necessary adjunct thereto; that said buildings were completely and fully equipped with all necessary appliances, facilities, plumbing, electric wiring, and because of the use to which the buildings were put, these appurtenances were more extensive and numerous than any other types of buildings and were of a higher quality. It is then alleged in paragraph 5 of the petition (Rec. 3) that by the Act of March 3, 1919, Section 2, c. 98, 40 Stat. 1302, Camp Joseph E. Johnston Hospital, together with its equipment, including sites and leases, was transferred to the

Treasury Department for the use of the Public Health Service. (Rec. 2, 3.)

It is further alleged that the lease from the claimants to the Chamber of Commerce of Jacksonville expired not later than three years from its date, or September 10, 1920, with an allowance of three months in which the buildings, fixtures, or other improvements may be removed from the demised premises, the last day thereof being December 10, 1920. (Rec. 3.)

On December 9, 1920, claimants wrote a letter to the Commanding Officer of Camp Johnston, requesting the removal of the property. In answer thereto the Commanding Officer informed claimants that he had no jurisdiction in the premises, stating that he had transmitted the letter to the Public Health Service, Hospital No. 33, Camp Johnston. (Rec. 3, 4.) Between January 10, 1921, and April 6, 1921, claimants corresponded with the United States Public Health Service relative to the removal of these improvements. On March 28, 1921, the United States Surgeon General addressed a letter to the attorney for claimants which in part reads (Rec. 6):

> Owing to the necessity of salvaging certain materials placed upon the property by the Government and now needed elsewhere for hospital purposes, the use of the premises will be required until May 1, 1921.

In answer thereto claimants' attorney, under date of April 6, 1921, notified the Surgeon General

that at a conference between the writer and Major Goodwin, the officer in charge of the hospital property at Camp Johnston, it was stated by the claimants that under the terms of the lease all the buildings, etc., on the land were now a part of the property itself and legally were no longer subject to removal. Major Goodwin was to communicate further with his superior officers in Washington, and the understanding was that no further destruction of any buildings now standing on the demised premises or any further removal therefrom would be made without notice to claimants. (Rec. 7, 8.) Notwithstanding this agreement, the Government removed the buildings and improvements from claimants' land during the early part of 1921, wherefore claimants demand damages in the sum of $100,000. (Rec. 6.)

The Court of Claims sustained the demurrer of the United States, and dismissed the petition.

ARGUMENT

The United States has always claimed title to the property involved and has never in any way acknowledged any right thereto in the claimants as against itself. Therefore the claim is one sounding in tort, for which no suit can be maintained against the United States.

The claimants contend that the failure of the United States to remove all the improvements upon the demised premises within the time specified in the lease from claimants to the Chamber of Commerce, vested, by operation of law, the title thereto in them. Upon the premise that the title of the

Government to this property became forfeited in the manner described, the claimants further contend that the removal of the improvements thereafter was a taking of private property, for which the United States must pay just compensation under the Fifth Amendment.

Perhaps the most serious objection to that view, however, is that under the Constitution Congress has the exclusive power to provide for the acquisition and disposal of all public property. (Article IV, Section 3; 33 Ops. A. G. 288, 290; 32 Ops. A. G. 511, 515; 22 Ops. A. G. 546, 549.) In the absence of legislative authority no public officer has the right to transfer, by contract or otherwise, the title to property which is vested in the United States. Persons dealing with Federal officers are charged with notice of the limits which the law places upon their power to contract. So, in the case at bar, the claimants must show by affirmative allegation that the officers with whom they dealt had the authority to bind the Government to the extent claimed. This has not been done. Claimants are relying in support of their claim upon the false premise that the negligence of Federal officers will operate as a forfeiture of property owned by the United States. What can not be done directly can not be done indirectly.

The want of power to contract away the vested title of the United States to property can not be aided by indulging in implications which amount to nothing more than negligence or laches on the part

of Federal officers or agents. (*McLeod* v. *Sherman*, 98 U. S. 565; *Whiteside* v. *United States*, 93 U. S. 247; *Eastern Extension Co.* v. *United States*, 251 U. S. 355, 363.) There is no merit whatever in a claim which is based upon the theory that the laches or negligence of agents of the Government operates to divest it of its title to property. The doors of the public treasury can not be opened in that way.

A still further objection to the position taken by the claimants is the general rule of law that while parties may agree upon a specified time within which improvements made by a tenant shall be removed, such a provision is not an agreement for forfeiture on failure to remove, and failure to remove within the time limit merely precludes the lessee from entering without being liable for damages. (*Reader* v. *Christian* (Tex. Civ. App.) 234 S. W. 155.)

The lease does not provide that there shall be a forfeiture of the lessee's title to the improvements placed upon the demised premises in the event the buildings, fixtures, etc., are not removed within the time designated therein. The presumption is always in favor of the right to remove buildings which a tenant has placed on the leased premises for his own purposes. (*Ryder* v. *Faxon*, 171 Mass. 206; *Schneider* v. *Bulger* (Mo. App.), 194 S. W. 737, 739–740; *Poillon* v. *Gerry*, 179 N. Y. 14, 19; *Lewis* v. *The Ocean Nav. & Pier Co.*, 125 N. Y. 341, 346; *Donnelly* v. *Frick, etc., Co.* 207 Pa. 597.) Under the cases just cited, if we

disregard the immunity of the United States for the unauthorized acts of its agents and assume the status of a private citizen, it nevertheless had a right to remove its buildings, fixtures, etc., from the demised premises, its liability, if any, being merely for damages for a trespass.

Apart from the foregoing considerations, however, this case is controlled by *Hill* v. *United States* (149 U. S. 593–599), wherein the rule is announced that, where property is taken by the United States under claim of title adverse to any other person, no contract on the part of the Government to pay therefor can be implied.

Nowhere in the petition or in the record itself is there any intimation that the United States has ever recognized in any way any right of the claimants to the property in question. On the contrary, the correspondence between the agents of the Government and the claimants shows that the United States has always asserted its right to remove all buildings, improvements, fixtures, etc., upon the demised premises, on the ground that it alone had title thereto. In this situation no promise on the part of the United States to pay therefor will be implied. (*Tempel* v. *United States*, 248 U. S. 121, 130.) For, as stated by Mr. Justice Brewer for this court in *United States* v. *Lynah* (188 U. S. 445, 465):

> When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an

> officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own.

The fact that the claimants have framed their claim as upon an implied contract is of no avail (*Hill* v. *United States,* 149 U. S. 593, 598), for it is none the less a case sounding in tort. (*Hijo* v. *United States,* 194 U. S. 315, 323.)

It is submitted that the action is one sounding in tort for which the United States can not be sued in the Court of Claims, or in any other court.

CONCLUSION

The appeal should be dismissed or the order of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
DECEMBER, 1924.

○

PEARSON ET VIR *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 264. Argued January 28, 1925.—Decided March 2, 1925.

Where the Government erected and used buildings on leased land with the oral permission of the lessee, and subsequently removed them, although the lessors contended that the right to do so had expired by the terms of the lease, *held;* (*a*) That, in the absence of proof that the Government had knowledge of the terms of the lease or of the lessors' acquiescence in the user, no relation

of landlord and tenant existed between the lessors and the United States under the lease from which an agreement of the latter to pay for the property could be implied. P. 426. (*b*) The Government having removed the buildings under claim of right, no agreement to pay as for property taken for public use could be implied. P. 427.

58 Ct. Cls. 485, affirmed.

APPEAL from a judgment of the Court of Claims dismissing the petition on demurrer

Mr. George F. Williams, with whom *Mr. Henry C. Clark* was on the brief, for appellant.

Mr. Solicitor General Beck and *Mr. Alfred A. Wheat,* Special Assistant to the Attorney General, were on the brief for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This action was brought under the Tucker Act [1] by Margaret W. Pearson and her husband to recover the value of buildings and improvements erected by the War Department on leased premises and removed after the expiration of the lease. The United States demurred to the petition on the ground that it did not state a cause of action within the jurisdiction of the court. The demurrer was sustained, and the petition dismissed. 58 Ct. Cls. 485.

The petition shows the following facts: On September 11, 1917, the claimants leased to the Chamber of Commerce of Jacksonville, Florida, a tract of land, to be used solely for federal camp purposes, for the maximum term of three years. The lease provided that all buildings and improvements placed upon the land during said term by the lessee, its successors or assigns, should re-

[1] Act of March 3, 1887, 24 Stat. 505, c. 359; Jud. Code, § 145.

main "the exclusive property of the lessee, its successors or assigns," and might be removed within the period of three months after the expiration of the lease. Shortly after the execution of the lease the Chamber of Commerce agreed "verbally" with the War Department that the land might be used and occupied as a portion of a training camp for United States troops; and the claimants acquiesced in and consented to its use and occupancy by the United States under and subject to the terms, conditions and provisions of the lease. The land was thereafter included in Camp Joseph E. Johnston. The War Department erected thereon a base hospital, homes for nurses and other buildings, and placed extensive improvements thereon. By a general provision in an Act of March 3, 1919,[2] this and other Camp hospitals were "permanently transferred to the Treasury Department for the use of the Public Health Service," with so much of their equipment, sites and leases, and such other buildings and land as might be required. The lease to the Chamber of Commerce expired on September 11, 1920. On December 9, 1920, the plaintiff's attorney wrote the Commanding Officer of Camp Johnston that by the terms of the lease all right of occupation and of entry and removal of buildings would cease on December 11, and that on that date the property should be finally surrendered to the plaintiffs without further removal or molestation of any of the property remaining thereon; and suggesting a conference in reference to the matter. The Commanding Officer replied to him that the hospital had been transferred to the Public Health Service, to which his letter had been referred, and with which the matter should be taken up. After some further correspondence, the Surgeon General of the Public Health Service, on March 28, 1921, wrote the claimants'

[2] 40 Stat. 1302, c. 98, § 2.

of landlord and tenant existed between the lessors and the United States under the lease from which an agreement of the latter to pay for the property could be implied. P. 426. (*b*) The Government having removed the buildings under claim of right, no agreement to pay as for property taken for public use could be implied. P. 427.

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[2] 40 Stat. 1302, c. 98, § 2.

attorney, describing the land as the Pearson Tract "occupied by the United States," and stating that: "Owing to the necessity of salvaging certain materials placed upon the property by the Government and now needed elsewhere for hospital purposes, the use of the premises will be required until about May 1, 1921." On April 6 the claimants' attorney replied reiterating the claim that under the terms of the lease all buildings, etc., were then part of the property and legally were no longer subject to removal; and suggesting a conference and proper adjustment of the matter. Without replying to this letter the Public Health Service continued to tear down and remove all the buildings and improvements that had been placed upon the land, and completed such removal by the end of June, 1921.

The petition alleges that the value of the buildings and improvements thus removed exceeds $100,000, and prays judgment against the United States for the full value of the property "removed as aforesaid from said lands in violation of the rights of petitioners."

1. The petition does not allege any contract by the United States, either express or implied in fact, to pay the claimants the value of the buildings and improvements removed by it. Nor does it set forth facts on which such a contract will be implied. It does not appear from the petition that the United States stood in any contractual relation with the claimants, as an assignee of the lease or otherwise. On the contrary it appears that it merely used the land under the oral permission of the Chamber of Commerce. And while the claimants allege, in general terms, that they acquiesced in and consented to such use and occupancy subject to the terms of the lease, it is not shown that the War Department either knew this fact or had any knowledge of the terms of the lease. Therefore, whatever may be the construction and effect of the lease as to the right of

removing buildings and improvements, or the implied obligation of the lessee or its assigns in regard thereto, the petition fails to show that as between the claimants and the United States there existed any relationship of landlord and tenant under the lease from which an agreement to pay for the property can be implied.

2. The petition shows no ground of recovery on an implied agreement upon the part of the Government to pay the claimants for property taken for public use. No recognition of the plaintiffs' title is alleged in the petition. On the contrary the facts shown plainly indicate that the buildings and improvements were removed by the Government as its own property under the claim of right. Under these circumstances no agreement to pay for them can be implied. Whether the Government's claim was well or ill founded, is immaterial. If it was unfounded, and the claimants' property rights violated, the cause of action therefor would be one sounding in tort, for which the Tucker Act affords no remedy. *Klebe* v. *United States,* 263 U. S. 188, 191, and cases cited.

The demurrer was rightly sustained, and the judgment is

Affirmed.